Supreme Court, U.S.
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No. 96-995

In The
Supreme Court of the United States
October Term, 1996

CHANCE MANAGEMENT, INC., a South Dakota corporation, and WILLIAM A. SANDERS, a Wyoming resident,

Petitioners,

v.

STATE OF SOUTH DAKOTA, et al,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STEVEN W. SANFORD
Counsel of Record
CADWELL SANFORD
DEIBERT & GARRY LLP
Attorneys for Petitioners
120 N. Phillips Avenue
Sioux Falls, SD 57104
(605) 336-0828

13 pp

QUESTIONS PRESENTED

1. Is a discriminatory residency requirement saved by the market participation exception to Commerce Clause scrutiny where the State has a monopoly in the relevant market, governs the relevant market by comprehensive statutes and regulations, requires licenses of all participants and does not act as a buyer, seller or employer?

2. Does a nonresident shareholder whose corporation is denied a government license because of his nonresident status have standing to challenge the discrimination under the Privileges and Immunity Clause in Article II, §2 of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Chance Management, Inc., a South Dakota corporation, and William A. Sanders, a Wyoming resident.

Respondents: State of South Dakota; Mark W. Barnett, in his official capacity as Attorney General of South Dakota; The South Dakota Lottery; Susan Walker, in her official capacity as Executive Director of the South Dakota Lottery; and H.I. King, Beverly McCracken, Elaine Emery, Don Bender, Burdette Solum and John E. Carmody, Sr., in their official capacities as members of the South Dakota Lottery Commission.

Note: Chance Management, Inc. has no subsidiaries or parent companies.

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2. A NONRESIDENT SHAREHOLDER WHOSE CORPORATION IS DENIED A GOVERNMENT LICENSE BECAUSE OF HIS NONRESIDENT STATUS HAS STANDING TO CHALLENGE THE DISCRIMINATION UNDER THE PRIVILEGES AND IMMUNITY CLAUSE IN ARTICLE II, §2 OF THE UNITED STATES CONSTITUTION. 4

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REASONS FOR GRANTING THE WRIT

1. A DISCRIMINATORY RESIDENCY REQUIREMENT IS NOT SAVED BY THE MARKET PARTICIPATION EXCEPTION TO COMMERCE CLAUSE SCRUTINY WHERE THE STATE HAS A MONOPOLY IN THE RELEVANT MARKET, GOVERNS THE RELEVANT MARKET BY COMPREHENSIVE STATUTES AND REGULATIONS, REQUIRES LICENSES OF ALL PARTICIPANTS AND DOES NOT ACT AS A BUYER, SELLER OR EMPLOYER.

Respondents erroneously assume that the basis for the Petition is limited to the reasons described in Judge Lay's dissent in the Court of Appeals decision [26a] and that the Petition is dependent upon an analogy to antitrust law. While Petitioners believe the reasoning of the dissent to be better grounded in this Court's market participation decisions than is the majority opinion, the Petition goes beyond the basis for the dissent.

At the heart of all cases cited in the Petition is the differentiation between a State as market participant and the State as market regulator. The Courts of Appeal in the cited cases have used differing indicia to make the distinction. Where the State acts as a monopolist, it is a market regulator. Where it engages in primeval government activity, it is a market regulator. Where it acts primarily by regulation, it is a market regulator even when it might otherwise be a market participant. Where a State acts by means unavailable to private market participants, it acts as a market regulator. See Petition for Writ of Certiorari pp.10-12.

Any one of those bases is sufficient to deny the market participation to the State. In this case the market participation exception is uniquely inappropriate because all the indicia of market regulation are present, instead of just any one of them. By according market participation status to the Respondents, the Eighth Circuit Court of Appeals has thus entered a decision in conflict with those of other Courts of Appeals and also in conflict with the relevant decisions of this Court.

Petitioners do not argue in our Petition, nor have we contended in either Court below, that this Court should look to antitrust law for the controlling principle. In this sense Respondents mischaracterize Petitioners' argument. The monopoly the State has in the video lottery market is important, however, because it is a badge of market regulation. *Western Oil & Gas Association v. Corey*, 726 F.2d 1340 (9th Cir. 1984), *aff'd* 471 U.S. 81 (1985), *rehearing denied*, 471 U.S. 1112 (1985). A monopoly by constitution is not the badge of participation in a free market. The contrast with *Reeves* is bright:

> South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders .... Moreover Petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement.

> .... Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers.

Reeves, Inc. v. Stake, 447 U.S. 429, 444, n.17 (1980). On each point the opposite is true here.

Both Respondents and the Court of Appeals rightly point out that this Court has not expressly limited market participation status to a buyer, seller or employer. But Respondents miss the point. What do private participants in a free market do? They buy, sell or employ. The fact that the State does not sell to, buy from or employ video lottery machine operators is strong indication that the State does not act as a private market participant and instead is a market regulator.

Finally, Respondents suggest, by going outside the record, that the market should be considered to be the gaming market and not the video lottery market, hoping to avoid monopoly characterization. Even the Court of Appeals suggested that the essential question is "whether the State is actually participating in a narrowly defined market as a proprietor . . . ." [9a]. This Court emphasized in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97-98 (1984) that the market must be narrowly defined so that the exception does not swallow the rule.

Acceptance of the gaming market argument would expand the market participation exception dramatically beyond its current limits. The Court should

consider the facts in *Reeves, supra*. If South Dakota had prohibited all but the State from making cement, had flatly refused to sell to nonresidents (instead of just establishing a preference), had forbidden resident purchasers from reselling to nonresidents and had adopted 150 statutes and regulations to govern the process, the *Reeves* decision would look quite different. The fact that a nonresident in *Reeves* was free to purchase asphalt for roads or wood or steel for building structures would not have been of any consolation. Similarly, the fact that Petitioners could participate in some form of gaming other than lottery should not sanction discrimination against Petitioners based on the nonresident status of Petitioner Sanders. A broad market definition would accomplish just that.

2. A NONRESIDENT SHAREHOLDER WHOSE CORPORATION IS DENIED A GOVERNMENT LICENSE BECAUSE OF HIS NONRESIDENT STATUS HAS STANDING TO CHALLENGE THE DISCRIMINATION UNDER THE PRIVILEGES AND IMMUNITY CLAUSE IN ARTICLE II, §2 OF THE UNITED STATES CONSTITUTION.

Respondents are certainly correct in asserting that corporations are not protected by the Privileges and Immunities Clause. Petitioners do not quarrel with this point nor seek reversal of this longstanding view.

Instead, Petitioners request that the Court consider and decide the question whether individuals who are themselves the object of State discrimination by

preventing them from owning or operating businesses of a certain character, solely because of their out-of-state residency, are permitted under the standing doctrine to contest that discrimination.

Respondents again mischaracterize Petitioners' argument. Petitioner Sanders does not attempt to assert the rights of a corporation under the Privileges and Immunities Clause. The corporation, of course, has no such rights and it would be pointless for Sanders to try to assert them. Instead Sanders asserts his own rights under the Privileges and Immunities Clause.

The standing doctrine is not peculiar to the Privileges and Immunities Clause. *Cf. J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 749-50 (7th Cir. 1993) (applying traditional standing doctrine rules to Privileges and Immunities Clause claim). *See e.g. Franchise Tax Board of California v. Alcan Aluminum, Ltd.*, 493 U.S. 331 (1990). Neither the Eighth Circuit Court of Appeals [20a-21a] nor the Fourth Circuit Court of Appeals in *Smith Setzer & Sons Incorporated v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1984) sought to articulate a standing doctrine peculiar to the Privileges and Immunities Clause. *See Smith Setzer*, 20 F.3d at 1316-17. The Fifth Circuit in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) held that individual nonresidents deprived of the right to own stock in a corporation holding a Texas alcoholic beverages license have a sufficiently direct and personal interest under the standing doctrine.

As a practical matter the holdings of the Eighth Circuit Court of Appeals and *Smith Setzer* would immunize from Privileges and Immunities Clause challenge any state law denying to nonresident individuals the right to engage in certain types of businesses using the corporate form. Respondents impliedly concede that if Sanders had applied for a video lottery machine operator's license as an individual, the denial of that license would be subject to scrutiny under the Privileges and Immunities Clause. It is only because he tried to engage in that business as a corporation, and was denied that right because of his Wyoming residency, that the discrimination escapes scrutiny. Because the corporate form of organization is so common, this distorted view of standing will legitimize just the sort of discrimination the Privileges and Immunities Clause was designed to prevent.

So, if the Court of Appeals decision below and *Smith Setzer* are viewed as being in lock step, and not in conflict, because both articulated a standing doctrine peculiar to the Privileges and Immunities Clause in the absence of any decision of this Court so holding, then review is certainly appropriate under Rule 10(c) of the Rules of the Supreme Court of the United States. If, however, application of the standing doctrine here conflicts with the generally applicable principles of the standing doctrine as described in *Cooper v. McBeath*, *supra*, then review is warranted under Rule 10(a). Under either view the question is sufficiently important to justify grant of review to resolve this issue, which has not yet been directly decided by the Court.

CONCLUSION

For all the reasons above-described, and those described in the Petition for Writ of Certiorari, Petitioners respectfully request that their Petition be in all respects granted.

Respectfully submitted,

STEVEN W. SANFORD
Counsel of Record
CADWELL SANFORD
DEIBERT & GARRY LLP
Attorneys for Petitioners
120 N. Phillips Avenue
Sioux Falls, SD 57104
(605) 336-0828

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